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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 685

WEST VIRGINIA POWER COMPANY, a corporation, and NORFOLK & WESTERN RAILWAY COMPANY, a corporation,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

RAYMOND T. JACKSON,
Cleveland, Ohio;

JESSE KNIGHT,
J. P. VAN DE VOORT,
New York, N. Y.;

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Charleston, W. Va.;

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Dated: October 6, 1941.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1941.

No. .....

WEST VIRGINIA POWER COMPANY, a Corporation, and
NORFOLK & WESTERN RAILWAY COMPANY, a Corporation,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

West Virginia Power Company and Norfolk & Western Railway Company respectfully pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit reversing a final order of the United States District Court for the Southern District of West Virginia, which had sustained petitioners' demurrer to, and dismissed, the petition of respondent for the condemnation of certain lands in Summers County, West Virginia, for use in the execution of a Statutory Scheme known as the Bluestone Reservoir Project.

A. Summary Statement of the Matter Involved.

1. *History and Definitive Character of Statutory Scheme Known as the Bluestone Reservoir Project.* The Statutory Scheme known as the Bluestone Reservoir Project is defined by House Document No. 91, 74th Congress, 1st Session, which was transmitted to the Congress on January 29, 1935 (R. 20-1).* In the reports contained in that document, the Corps of Engineers considered two plans for the Bluestone site on New River just above Hinton, West Virginia, which plans were respectively denominated Plan (a) and Plan (b) (H. D. 91, pp. 118-9, par. 72; pp. 93-4, par. 4).

Plan (a) provided for the utilization of the entire Bluestone site to the maximum practical elevation (1520 feet above sea-level) for the construction of a flood-control project. This project would provide flood storage of 625,600 acre-feet with *annual flood benefits of $740,000* at an estimated cost of $9,466,340, *but would create no water power* (H. D. 91, p. 118, par. 72(a); pp. 93-4, par. 4). This flood storage would not be sufficient to control the maximum flood of record (H. D. 91, p. 95, par. 8; p. 118, pars. 70-71).

Plan (b) provided for the utilization of the Bluestone site up to elevation 1490 for the construction of a power project, with storage for power purposes of 390,100 acre-feet† and the necessary power house and appurtenances which would produce power estimated to yield an annual

* The certified copy of the record herein has been filed with the Clerk of this Court. By stipulation (R. 82-3), for the purposes of this petition the printed record consists of (1) the "Appendix to Brief for the United States" before the Court of Appeals and (2) a printed copy of the proceedings had before that Court. The latter has been inserted at the end of, and under the original cover with, said Appendix.

A copy of H. D. 91 accompanies the record.

† This comprises dead storage in the amount of about 128,000 acre-feet, the balance being power storage.

revenue of approximately $940,000. Under Plan (b), the remaining usable part of the site, viz., that part between elevations 1490 and 1520, was to be utilized by constructing —on top of the power project—a relatively small flood-control reservoir with *only 235,000 acre-feet of flood storage and* estimated annual *flood benefits of only $370,000* (H. D. 91, p. 119, par. 72(b); p. 94, par. 4; p. 115, par. 62). The combined cost of the power project and the flood-control project, to be constructed at the Bluestone site under Plan (b), was estimated at $12,942,390 (H. D. 91, p. 119, par. 72(b)).

Plan (b) was recommended by the District Engineer, the Division Engineer and the Mississippi River Commission and *conditionally* recommended by the Board of Engineers and the Chief of Engineers, in each case with the inclusion of the power project as an independent and primary purpose. These recommendations are unvarying in their designation of the power project or development as a separate and independent purpose and element of Plan (b). Each of the foregoing authorities recommended Plan (b) in preference to Plan (a) even though Plan (b) diverted the larger part of the site to the power project at the expense of flood-control and flood-benefits and did so solely because of the anticipated profits from the power project (H. D. 91, p. 5, par. 16; p. 9, par. 14; p. 95, par. 11; p. 96; p. 120, par. 75). Thus, the Division Engineer, while noting that Plan (b) would greatly reduce flood-storage capacity, would greatly reduce flood-control benefits and would greatly increase the cost in comparison with Plan (a), concluded that Plan (b) "appears the most attractive" because of the large revenues anticipated from the power project included in that plan (H. D. 91, pp. 93-95, particularly par. 8).

With reference to streams in the Kanawha Basin (including New River), the Army Engineers stated:

> "The silt content of the streams is small and causes no appreciable detriment to uses of the water for navigation, water supply or other purpose." (H. D. 91, p. 34, par. 37).

Apart from any beneficial effects accruing to navigation from the flood-control project included in Plan (b), as distinguished from the power project included therein, the reports of the Army Engineers disclose that the Statutory Scheme will be of no benefit to navigation (H. D. 306, 74th Cong., 1st Sess., p. 80, Table 19; p. 94, Table 27; p. 183, Table 53).*

However, both the Chief of Engineers (his being the final and controlling recommendation) and the Board of Engineers conditioned their recommendation of Plan (b) by the following proviso:

> "* * * *provided that* definite agreement is entered into before construction is begun for the disposal of the power at prices and under conditions that in the opinion of the Secretary of War will fully protect the public interest." (H. D. 91, p. 5, par. 16; p. 9, par. 14).†

(For the complete text of the recommendation of the Chief of Engineers see R. 71.)

2. *The Terms and Conditions of the Purported Authorization of the Statutory Scheme Known as the Bluestone Reservoir Project.* By Executive Order No. 7183A, issued September 12, 1935, under authority allegedly vested in the President by the National Industrial Recovery Act of 1933 and the Emergency Relief Appropriation Act of 1935, the President purportedly authorized the construction of a project, to be known as the Bluestone Reservoir Project,

* A copy of H. D. 306 accompanies the record certified to this Court.

† Unless otherwise indicated, all italics herein are supplied.

"in accordance with the Report of the Chief of Engineers to the Congress* *and* the plans and specifications submitted therewith" (R. 72).

On June 22, 1936 Congress passed a Flood Control Act (49 Stat. 1570, 1572, 1576), the authorization provisions of which contain the following:

> "OHIO RIVER BASIN
>
> * * * * * * *
>
> "Reservoir system for the reduction of Ohio River floods below Pittsburgh: Construction of reservoirs including the completion of the Bluestone Reservoir now under way, which together with the reservoirs for Pittsburgh flood control, constitutes a comprehensive plan for flood control on the main stream of the Ohio River and on the tributary stream below the reservoirs, as set forth in House Document Numbered 306, Seventy-fourth Congress, first session; estimated construction cost, $19,616,800; estimated cost of lands and damages, $10,519,600."

This Act, it should be noted, did not authorize the so-called Bluestone Reservoir Project in accordance with any plans and specifications in H. D. 306. Indeed, no plans or specifications for that project were contained in or accompanied that report. On the contrary, in H. D. 306 the Chief of Engineers stated:

> "The construction of this reservoir (Bluestone) * * * has been recommended in the comprehensive report on the Kanawha River (H. Doc. No. 91, 74th Cong., 1st Sess.), *provided that a definite agreement can be entered into for the disposal of the power at prices* which will protect the public interest." (H. D. 306, p. 4, par. 13.)

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* Neither the Executive Order nor the petition in the prior or present condemnation proceedings (see pp. 6-8, *infra*) identified this report as H. D. 91, 74th Congress, 1st Session; but the Bill of Particulars in this case so identifies it (R. 20-1).

It is thus clear that the reference to the Bluestone Reservoir Project in the Act of June 22, 1936, was upon the assumption that such project was then "under way" by virtue of prior authorization under the Executive Order and that the authorization, if any, of the project by that Act was by way of ratification of the Executive Order, as was held in *United States* v. *West Virginia Power Co.*, 91 F. (2d) 611, 614.

Before any effective action had been taken under such authority, if any, as was granted by the Act of June 22, 1936, the Flood Control Act of June 28, 1938 was passed. The authorizations thereunder included:

> "OHIO RIVER BASIN
>
> "The general comprehensive plan for flood control and other purposes in the Ohio River Basin * * * : *Provided further*, That the *provisions* of Executive Order Numbered 7183A, dated September 12, 1935, *are approved*, and the acquisition at the cost of the United States of all lands, easements, and rights-of-way needed for the Bluestone Reservoir project are hereby authorized: * * *"

3. *Prior Litigation.* On April 2, 1936, respondent filed a petition for condemnation of lands for the construction of the so-called Bluestone Reservoir Project under the alleged authority of the aforesaid Executive Order No. 7183A. Neither the petition nor the Executive Order identified the Report of the Chief of Engineers which was relied upon in both, and neither disclosed the condition imposed by the Chief of Engineers upon his recommendation in that Report for construction of the project. Petitioner, West Virginia Power Company, demurred upon the sole ground that the Acts relied upon as authority for the issuance of the Executive Order were, if held applicable to the authorization of such projects, unconstitutional delega-

tions of legislative power. The District Court sustained the demurrer and dismissed the petition. On appeal, this order was reversed upon the ground that the intervening Act of June 22, 1936 had ratified the Executive Order. 91 F. (2d) 611, 614. While a petition for certiorari was pending, respondent dismissed its condemnation petition in the District Court over the objection and exception of petitioner, West Virginia Power Company. Thereafter the petition for certiorari was dismissed because the questions raised had thus been rendered moot. 302 U. S. 770-1.*

4. *The Present Action.* On June 26, 1939, respondent filed the present action. After the District Court, upon motion of petitioners, had required the respondent to identify the Report of the Chief of Engineers referred to in the Executive Order and in the petition, and after respondent had amended its petition in response to a ruling of the District Court on an earlier demurrer, petitioners demurred to the petition as amended, the principal grounds being: (1) that the amended petition failed to show any authority in any federal officer to institute and maintain the proceeding, in that the petition failed to allege the prior execution of any definite agreement for the disposal of the power to be created, as required by the terms of the purported authorization; (2) that the purported authorization of the Statutory Scheme is in excess of the constitutional authority of respondent (R. 45-7, 51). The District

* As to the irrelevant and wholly unfounded remarks of the court below (R. 71), regarding counsel's failure to raise the question of condition precedent in the prior condemnation proceeding, all counsel for petitioner, West Virginia Power Company, in that proceeding were of the opinion that the proviso in the report of the Chief of Engineers (H. D. 91, p. 5), requiring a definite agreement for the disposal of the power, constituted a condition precedent to the right to condemn land for the project, but believed that under the state of the pleadings the point could be raised only by answer, not by demurrer.

Court sustained the first ground of demurrer, but overruled the second ground upon what he conceived to be the authority of *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377, and *Oklahoma* v. *Atkinson Co.*, 312 U. S. ...., 61 Sup. Ct. 1050, 85 L. Ed. 977 (R. 62). Since respondent did not desire to plead further, the District Court entered a final order dismissing the petition.

On appeal, the Court of Appeals for the Fourth Circuit reversed the District Court upon the grounds: (1) that the condition imposed by the Chief of Engineers upon his recommendation for the construction of the project was not adopted by the Executive Order and consequently was not adopted by the Congress in the Act of June 28, 1938; (2) that, even though the Congress had adopted the condition in the Act of June 28, 1938, nevertheless, in the absence of express language of revocation, the supposedly unconditional authorization of the project in the Act of June 22, 1936 would continue in full force and effect; and (3) that the question of constitutional authority to authorize the power project included in the Bluestone Statutory Scheme was concluded by the decision of this Court in *Oklahoma* v. *Atkinson Co.*, 312 U. S. ....., 61 S. Ct. 1050, 85 L. Ed. 977 (R. 69-79).

B. Jurisdiction.

The order of the Circuit Court of Appeals was entered on September 17, 1941. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938; 28 U. S. C. 347.

C. Questions Presented.

1. Whether congressional authorization of a project "in accordance with the Report of the Chief of Engineers to the Congress *and* the plans and specifications submitted

therewith" (Exec. Order 7183A, the provisions of which were approved by the Act of June 28, 1938) conditions the authority granted to the federal officers upon the occurrence or performance of an express condition imposed by the Chief of Engineers upon his recommendation of the project and without which the project does not have his recommendation (H. D. 91, p. 5).

2. Whether the Congress has constitutional authority to authorize the construction and operation of the power project included in the Statutory Scheme known as the Bluestone Reservoir Project, purportedly authorized by the Act of Congress of June 28, 1938.

D. Reasons Relied Upon for Allowance of the Writ.

1. The court below held that the condition imposed by the Chief of Engineers upon his recommendation for the construction of the project (H. D. 91, p. 5) was not adopted by Executive Order No. 7183A authorizing the construction of the project "in accordance with the report of the Chief of Engineers to the Congress [H. D. 91, p. 5] *and* the plans and specifications submitted therewith" and was not adopted by the Congress in the Act of June 28, 1938 (52 Stat. 1215, 1217) approving the provisions of the Executive Order (R. 70-75). In other words, the court below held that an authorization in accordance both with a report and with the plans was only an authorization in accordance with the plans and that the authorization in accordance with the report was meaningless. In so holding, the court below decided an important question of federal law which has not been, but should be, decided by this Court. With congressional authorization of many projects all over the country involving the expenditure of hundreds of millions of dollars, the question of whether or not federal officers,

under the terms of authorizations of this character, must comply with all, none or only part of the conditions contained in the report of the Chief of Engineers and imposed by him upon his recommendation for the construction of a project (in accordance with which report alone the federal officers are authorized to construct the project), is a highly important question of federal law. The decision of the lower court on this point is probably in conflict with the decision of this Court in *United States* v. *Arizona*, 295 U. S. 174, 189, but if not, then this is an important question of federal law which has not been, but should be, decided by this Court.

1a. Moreover, in so holding, the decision of the lower court is probably in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in *Ryan* v. *Chicago B. & Q. R. R.*, 59 F. (2d) 137, 143.

2. The court below apparently held that even though the Congress, by its approval of the provisions of the Executive Order by the Act of June 28, 1938, had adopted the condition imposed upon the construction of the project by the Chief of Engineers in his report, nevertheless, in the absence of express language of revocation, the supposedly unconditional authorization of the project in the Act of June 22, 1936 would remain in full force and effect (R. 74). The decision of the lower court in this respect is in plain conflict with applicable decisions of this Court holding that, when a later statute conflicts with an earlier statute, the earlier statute is repealed to the extent of the conflict. *Posadas* v. *National City Bank*, 296 U. S. 497, 503; *United States* v. *Tynen*, 11 Wall. 88, 92; *Fisk* v. *Henarie*, 142 U. S. 459, 467; *District of Columbia* v. *Hutton*, 143 U. S. 18, 26.

3. The court below, ignoring the undisputed facts in the instant case, held in substance (R. 77-9) that, so long as the Congress in the same statute also authorizes a flood-control project at the same site, the Congress has constitutional authority to authorize a power project to create water power for sale to the public, without regard to whether the water power will come "into being in the operation of works constructed in the exercise of some power delegated to the United States". *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 340. In so holding, the lower court misconstrued and misapplied the decision of this Court in *Oklahoma* v. *Atkinson Co.*, 312 U. S. ....., 61 Sup. Ct. 1050, 85 L. Ed. 977, and decided a question of federal law in conflict with the decisions of this Court in *Oklahoma* v. *Atkinson Co., supra; United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377, 426; *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 340; *Kaukauna Co.* v. *Green Bay Co.*, 142 U. S. 254, 273, 275; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 73; *Green Bay Canal Co.* v. *Patten Paper Co.*, 172 U. S. 58; *United States* v. *River Rouge Improvement Co.*, 269 U. S. 411, 419; *Wisconsin* v. *Illinois*, 278 U. S. 367, 417.

In the *Atkinson* case the question was whether the creation of the dead storage and of the storage for the regulation of low-water flow, which would necessarily create water power, were related to the constitutional functions of (a) navigation improvement or (b) providing flood protection. Under the unique conditions existing in the *Atkinson* case with respect to insufficiency of low-water flow and to silting and to their effect upon navigation and flood control on the Red River, it was established that the provision of dead storage and of storage for the regulation of low-water flow were necessary and appropriate for providing flood control and the improvement of navigation on the Red River quite

apart from the fact that they would also create water power. This was due to the fact that, owing to the location of the Red River in an arid region where extremely heavy silting and inadequate flows are characteristic of the streams, the regulation and enrichment of low-water flow was necessary for navigation below and provision for silt accumulation was necessary both for such navigation and for flood control.

Under the undisputed facts in the instant case, however, the dead storage and power storage are created solely for the development of power. Neither is in aid of, but each is at the expense of, flood-control, and neither has any beneficial effect upon navigation. (See pp. 24-32, *infra*.)

The lower court, evidently considering only the superficial resemblance in nomenclature and plainly disregarding the circumstance that the instant case presents a totally different situation from that in the *Atkinson* case with respect to these constitutional facts, held that the *Atkinson* case was controlling—and did so despite the fact that the decision of this Court in the *Atkinson* case was based upon a state of facts precisely opposite to that before the Court in the instant case.

4. The court below held that it is for Congress to decide to what extent the utilization of available sites for flood-control shall be sacrificed to their utilization for the creation of water power, so as to make the flood-control project economically feasible (R. 77). In so holding, the lower court again misconstrues and misapplies the decision of this Court in the *Atkinson* case. Congress may decide to what extent it will refrain from appropriating for flood control a site which is also suitable for power development, just as it may determine to what extent it will refrain from utilizing lands for flood control at the expense of their utilization for

agriculture. But under the decisions of this Court that circumstance no more establishes constitutional authority for the government to construct a power project than it does to engage in agriculture for the sale of farm products for profit.

4a. Moreover, to the extent that this is a holding that Congress, in addition to its power to raise money by taxation or borrowing, may engage in a business enterprise in order to produce income with which to carry out other objectives even if clearly constitutional, the decision is probably in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in *United States* v. *Certain Lands in the City of Louisville,* 78 F. (2d) 684, 688, and in any event presents an important question of federal law which has not been, but should be, decided by this Court.

4b. The decision of the court below on this point is also in conflict with *The License Tax Cases,* 5 Wall. 462, 471, holding that the government may not engage in a business in order to tax it.

4c. The decision of the court below on this point, insofar as it upholds the power of the government to condemn lands for such a business enterprise, further is in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in *Cincinnati* v. *Vester,* 33 F. (2d) 242, 244-5, (affirmed on other grounds 281 U. S. 439) holding that condemnation of lands for the purpose of engaging in business and making a profit is a taking for a private purpose and a denial of due process of law.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the

United States Circuit Court of Appeals for the Fourth Circuit should be granted.

WEST VIRGINIA POWER COMPANY,
NORFOLK & WESTERN RAILWAY COMPANY

By RAYMOND T. JACKSON,
JESSE KNIGHT,
J. P. VAN DE VOORT,
ERNEST K. JAMES,
JOSEPH M. SANDERS,
Their Attorneys.

Dated: October 6, 1941.

BRIEF IN SUPPORT OF FOREGOING PETITION FOR A WRIT OF CERTIORARI.

A.

Opinions Below.

The opinion of the District Court (R. 27-44) sustaining the demurrer interposed by petitioners to the original condemnation petition, with leave to respondent to plead further, is reported in 33 F. Supp. 756. The opinion of the District Court upon the demurrer to the petition as amended (R. 52-64), pursuant to which demurrer the final order dismissing the petition as amended was entered, is reported in 39 F. Supp. 540. The opinion of the Circuit Court of Appeals (R. 68-80) is not yet reported.

B.

Jurisdiction.

A statement particularly disclosing the basis upon which it is contended that this Court has jurisdiction to review the Order of the Circuit Court of Appeals is set forth in the petition at page 8, *supra.*

C.

Statement of the Case.

A Statement of the Case has been given under heading "A" in the petition for certiorari (pp. 2-8, *supra*) and to avoid duplication is not repeated.

D.

Specification of Errors to be Urged.

The court below erred:

1. In holding that Executive Order 7183A, in authorizing the construction of the so-called Bluestone Reservoir Project "in accordance with the report of the Chief of Engineers to the Congress *and* the plans and specifications

submitted therewith", did not adopt a condition imposed by the Chief of Engineers upon his recommendation of the project (H. D. 91, p. 5), viz., that said project should be constructed only "*provided that* definite agreement is entered into before construction is begun for the disposal of the power at prices and under conditions that in the opinion of the Secretary of War will fully protect the public interest".

2. In holding that the aforesaid condition was not adopted by the Congress through its express approval and adoption of "the provisions of Executive Order Numbered 7183A" in the Act of June 28, 1938.

3. In holding that, even if the Congress adopted the aforesaid condition by the Act of June 28, 1938, the allegedly unconditional authorization of the project in the Act of June 22, 1936, would nevertheless, in the absence of express language of revocation in the Act of June 28, 1938, remain in full force and effect.

4. In holding that the Congress had constitutional authority under the facts and circumstances of this case to authorize the construction of the power project included in the Bluestone Statutory Scheme for the creation of water power for sale to the public.

5. In holding that the Congress has constitutional authority to authorize a power project to create water power for sale to the public in order to obtain income with which to defray the cost of, or to make "economically feasible," some constitutional project.

6. In reversing the final order of the District Court.

ARGUMENT.

I.

The condition imposed by the Chief of Engineers upon his recommendation for the construction of the project was adopted by the Congress and is a condition precedent to the existence of any authority in the federal officers to condemn.

The Act of June 28, 1938, expressly approved, and thereby adopted, "the provisions of Executive Order Numbered 7183A" (p. 6, *supra*). The plain significance and meaning of the *proviso*, contained in the Act of 1938 concerning the Bluestone Reservoir, is that, *whatever* may theretofore have been done or said—in the Act of 1936, in preceding portions of the Act of 1938 or elsewhere—, the authorization of the project is completely and solely in accordance with the expressly approved provisions of the Executive Order. The Executive Order only authorized and directed "the construction of said Bluestone Reservoir Project *in accordance with the report of the Chief of Engineers* to the Congress *and* the plans and specifications submitted therewith" (R. 72). The recommendation in the report of the Chief of Engineers incorporated as an integral part thereof a specific condition in the absence of which the construction of the project was not recommended at all. The Executive Order thus plainly imposed two limitations upon the authority granted to the federal officers. To be within its scope, any action pursuant to that authority must be not only in accordance with the approved plans and specifications but also in accordance with the report of the Chief of Engineers.

The court below apparently reasoned that, although one of the limitations imposed upon the authority to construct

the project was that it should be constructed "in accordance with the report of the Chief of Engineers", that limitation might be disregarded upon the theory that the last sentence of the Executive Order, making available for acquisition of lands part of the sum alloted to the project (the total allotment being only 1/13th of its estimated cost), was inconsistent with the foregoing proviso in the express language of authorization, and that therefore the last sentence should be regarded as controlling (R. 73). This was erroneous. Did such inconsistency exist, plainly the language which would control as to the terms and conditions of the authorization would be that which deals specifically with the authorization of the project rather than the language which deals with the entirely different and collateral subject of directions for expenditure of the inadequate funds alloted. *United States* v. *Jackson* (C. C. A. 9) 143 Fed. 783, 787; Brewer, J. in *Long* v. *Culp,* 14 Kansas 412, 414.

However, no such inconsistency existed or exists; for the Secretary of War could readily before acquiring the lands enter into definite agreement for sale of the power. It may also be noted that the phrase, "in anticipation of their [the lands'] use for such project", obviously had reference to the fact that the actual use of the lands for the declared purposes would in any event have to await the provision of further funds.

Plainly, any attempt of the federal officers to condemn lands for the construction of some project which would not be in accordance with the approved plans and specifications, would have been in excess of their authority. *Ryan* v. *C. B. & Q. R. R.,* (C. C. A. 7) 59 F. (2d) 137, 143. It is equally clear that any attempt of the federal officers to proceed with the construction of the project without complying with any material condition imposed by the Chief

of Engineers upon his recommendation, is likewise in excess of the authority granted.

There could be no purpose in using the words "in accordance with the report of the Chief of Engineers to the Congress" (words approved by the Congress by its adoption of the provisions of the Executive Order) except to impose, upon the authority granted to the federal officers by the Executive Order, the condition specified in that report. Any other construction would ignore and treat as a nullity the words "in accordance with the report of the Chief of Engineers to the Congress", which is precisely what the lower court did.* But that manifestly is in violation of every rule for the construction of statutes and other written instruments and the conclusion of the lower court seems plainly in conflict with the decision of the Seventh Circuit Court of Appeals in *Ryan* v. *C. B. & Q. R. R., supra.* Indeed, the reasoning of the lower court seems to be that, in the absence of an express statement to the contrary, the unqualified adoption of a document, plan or instrument containing conditions, is a rejection of the conditions. Obviously the contrary is true.

Where the Congress desires to authorize a project without adopting any condition imposed by the Chief of Engineers upon his recommendation in the pertinent report, the authorization is "in accordance with the plans and specifications submitted" without further reference to such report of the Chief of Engineers and without requirement that the federal officers shall proceed in accordance with such report as distinguished from the approved plans and specifications. Where, however, the Congressional authorization is *further* limited to the construction of a project

* In so doing, the lower court on this point completely misstates (R. 75) ~~Appellees'~~ Petitioners' position, which was precisely the same in the lower court as stated in this brief.

"in accordance with the report of the Chief of Engineers", the authorization must be held to adopt any substantial condition imposed upon the recommendation of the project by the Chief of Engineers.

Whether under such an authorization the federal officers must comply with all, none, or only part of the conditions imposed by the Chief of Engineers upon his recommendation for the construction of a project by the report in accordance with which alone the federal officers are authorized to construct the project, is a highly important question of federal law which should be decided by this Court, if it has not already been decided in *United States* v. *Arizona*, 295 U. S. 174, adversely to the decision of the lower court.

In the instant case, the conclusion, that the condition incorporated in the Report of the Chief of Engineers was imposed upon the authority granted to the federal officers, is supported by another compelling consideration. The alleged authority for the issuance of the Executive Order was the National Industrial Recovery Act. Section 202 of that Act provided that no river or harbor improvement should be carried out thereunder unless the project had been adopted by the Congress or recommended to the Congress by the Chief of Engineers. The President's authority to authorize the construction of the project under the Recovery Act thus rested solely upon the recommendation of the Chief of Engineers to the Congress. *United States* v. *Arizona*, 295 U. S. 174. But without the performance of the condition precedent, the construction of the project was not recommended at all by the Chief of Engineers.

The lower court in effect held that, the Chief of Engineers having recommended that the project be constructed only in the event of the occurrence or performance of an express condition, the President, relying upon such recom-

mendation as the foundation for his statutory authority (Sec. 202, Recovery Act) in the premises, could entirely disregard a *sine qua non* of the recommendation and authorize the project upon terms under which the project had never been recommended at all, but had in effect been disapproved, by the Chief of Engineers. This amounts to contending that the President could authorize a project which had never been recommended by the Chief of Engineers, a contention which is plainly untenable. Where the President undertook to authorize the carrying out of a river or harbor project (not theretofore adopted by the Congress), under the authority vested in him under the Recovery Act, he could no more disregard the terms and conditions of the recommendation of the Chief of Engineers for construction of such project than he could authorize the carrying out of a project theretofore adopted by the Congress in disregard of the terms and conditions imposed upon its construction by the Congress. No other conclusion would be consistent with the decision of this Court in *United States* v. *Arizona*, 295 U. S. 174, 192.

The court below, erroneously holding that the Act of June 22, 1936 gave the unconditional approval of Congress to the project, further held that this supposedly unconditional approval brought the project within the pertinent language of Section 202 of the Recovery Act and thereby supported the lower court's interpretation of the language of the Executive Order as not adopting the condition. However, as the lower court held in the earlier case, 91 F. (2d) 611, 614, Congressional approval by the Act of 1936 was at most by way of ratification of the Executive Order —a ratification which necessarily carried with it all the conditions therein contained. (See pp. 5-6, *supra*.) But in any event, the Act of 1936 is wholly irrelevant to the

proper interpretation of the Executive Order. Even if unconditional, *a subsequent* authorization by Congress could hardly furnish any support for disregarding the plain language in the *prior* Executive Order, or for holding that therefore such plain language should be construed differently than would otherwise be the case.

The lower court, having erroneously held that the Act of June 22, 1936 had unconditionally approved the project, further held that in the absence of express words of revocation in the Act of 1938, the supposedly unconditional approval of the project by the Act of 1936 was not affected by the subsequent Act. (R. 74.) This discussion of the Act of 1936 is both irrelevant and erroneous. The lands were not acquired nor the project constructed prior to the Act of 1938. If the Act of 1936 did not approve the Executive Order (which necessarily adopted the condition), it is to that extent plainly in conflict with the Act of 1938, which expressly adopts the provisions of the Executive Order. Upon that hypothesis, the Act of 1938 plainly constitutes an implied repeal of the Act of 1936 to the extent of the conflict. *Posadas* v. *National City Bank*, 296 U. S. 497, 503; *United States* v. *Tynen*, 11 Wall. 88, 92; *Fiske* v. *Henarie*, 142 U. S. 459, 467; *District of Columbia* v. *Hutton*, 143 U. S. 18, 26-7.

That the Congress intended to adopt and did adopt the condition is further shown by the legislative history of the Flood Control Act of August 18, 1941. The Congress declined to accede to a request of the Department of Justice that there be inserted in the Bill an amendment which would authorize the acquisition of the lands for the Bluestone Reservoir Project *"without first entering into the definite agreement for the disposal of the power"*. (Hearings before Sub-committee on Flood Control of Senate

Commerce Committee on H. R. 4911, 77th Congress, 1st Session, 43-4; Act of Congress of August 18, 1941.)*

If, as we have shown, the condition was adopted by the Congress, the federal officers, as was substantially conceded below by respondent, are without authority to condemn until the condition is satisfied. The District Court held correctly "that the condemnation of the lands is the first step in the construction of the power dam" (R. 63). *Pittsburgh C. & T. R. Co.* v. *Tod,* 72 Ohio St. 156, 74 N. E. 172; *In re Rochester Electric Ry. Co.,* 123 N. Y. 351, 25 N. E. 381. Indeed, the President expressly so construed the language. Omitting immaterial words, the pertinent provisions of the Executive Order read:

> "I hereby allocate * * * $1,000,000 *for the construction* of the said Bluestone Reservoir Project * * *. Of *the amount* above allocated the sum of *$800,000 shall be available for the acquisition* by purchase, *condemnation,* or otherwise, of lands * * *" (R. 72-3).

However, if the requirement, that a definite agreement for the sale of the power be executed before construction is begun, were construed to be a condition precedent only to the building of the project on the lands, or, in other words, to the use of the land for the authorized purposes, the federal officers would still be without authority to condemn until the condition had been satisfied. Whenever authority to construct, or in other words to carry out, a project depends upon a condition which has not yet occurred or

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* The requested amendment read:

> "That the Secretary of War is herein authorized and directed to proceed with the acquisition of lands for, and the construction of, the Bluestone Reservoir project heretofore authorized by the act of June 22, 1936, 49 Statutes, 1570-1586, and June 28, 1938, 52 Statutes, 1215-1217, *without first entering into the definite agreement for the disposal of the power.*"

which has not yet been performed, there is no authority to condemn lands of a private owner for use in the construction of the project. *Minnesota Canal & Power Co.* v. *Pratt,* 101 Minn. 197, 112 N. W. 395, 403-4; *City of New Lisbon* v. *Harebo, et al.,* 224 Wis. 66, 271 N. W. 659, 662-3; *Wisconsin Water Co.* v. *Winans, et al.,* 85 Wis. 26, 54 N. W. 1003, 1007; *In re Rochester Elec. Ry. Co.,* 123 N. Y. 351, 25 N. E. 381, 382-3; *Department of Public Works & Buildings* v. *Engel,* 315 Ill. 577, 146 N. E. 521, 524; *Winter* v. *Telephone Co.,* 51 N. J. Law 83, 16 Atl. 188.

II.

Respondent is without constitutional authority to authorize the construction and operation of the power project included in the Statutory Scheme known as the Bluestone Reservoir Project.

Where water power is created by the Federal Government, not for federal use but for sale to the public, the constitutional question in each case is whether the water power is created as the incidental result of the construction and operation of structures which have a real adaptedness and *bona fide* and substantial relation to the accomplishment of some constitutional function.

In *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, this Court said:

> "* * * And the Government rightly conceded at the bar, in substance, that it was without constitutional authority to acquire or dispose of such energy except as it comes into being in *the operation of works constructed in the exercise of some power delegated to the United States*" (loc. cit. 340).*

* The question of whether and under what circumstances the United States may constitutionally create raw water power (i.e. the mechanical energy created by impounded water) is not to be

That the decision of the lower court upon this point rests upon a misconstruction and misapplication of the decision of this Court in *Oklahoma* v. *Atkinson Co., supra,* and is in conflict with the decisions of this Court in the *Atkinson* case and in many other cases, sufficiently appears, we think, from the petition (pp. 11-12, *supra.*). But it is made inescapably clear by the following comparison of the constitutional facts underlying the decision in the *Atkinson* case with the precisely opposite facts presented in the case at bar.

Both dead storage and storage of water for use during extreme low-water periods are necessary for the practical development of commercial water power. The facts hereinafter reviewed establish that in the *Atkinson* case the provision of dead storage and of storage for regulation of low-water flow was necessary and appropriate for providing flood-control and for improving navigation on the Red River, quite apart from the fact that such provision would also and necessarily result in the creation of water power.

The Red River flows through an arid or semi-arid region with sparse vegetation and loose soil for long distances in its upper reaches and thus creates a grave silting problem from the standpoint of navigation on its navigable reaches. The resulting silt deposits created obstructions to navigation and provision of any adequate navigation improvement either by open channel or slack-water methods required adequate provision for silt accumulation at the Denison Project.

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confused with the right of the United States to convert or manufacture raw water power or mechanical energy into electricity when and if the raw water power has been constitutionally created and has constitutionally become the property of the United States. The right so to convert is clear but arises only after the raw water power has been constitutionally created or acquired. The instant case involves the question whether the raw water power will be constitutionally created and acquired by respondent.

Thus, the Army Engineers stated: "Red River is a heavy carrier of silt" (Definite Project for Denison Dam and Reservoir—Red River, par. 25). "Its name is derived from the color of its waters which is due to its yellowish-red silt content" (H. D. 541, p. 45, par. 50). "The semi-arid region" of its reaches above the Denison project is "part of the great interior 'dust bowl region' ". (*Ibid.*, p. 45, par. 50.)

The Engineers reported that the annual silt accumulations in the Denison reservoir would amount to approximately 20,000 acre feet a year. On an estimated life of fifty years for the project, this required 1,020,000 acre feet of dead storage to accommodate the silt accumulations; and the volume of dead storage provided in the recommended plan had been measured and established, not by determining what would be necessary or useful for power development but, solely by determining the precise amount of space which would be required for silt accumulation in order to achieve the planned flood-control and navigation improvements. (Definite Project for Denison Dam and Reservoir—Red River, pars. 24-25.)

In contrast, the New and Kanawha Rivers, like the other tributaries of the Ohio, flow through a region of abundant rainfall and vegetation and there is no silting problem involved. Not only are the Engineering Reports in the instant case barren of any suggestion that dead storage is either needed or provided at the Bluestone site for silt accumulation or for any purpose other than the creation of head for water power, but the Army Engineers expressly state:

> "The silt content of the streams is small and causes no appreciable detriment to uses of the water for navigation, water supply or other purpose." (H. D. 91, p. 34, par. 37).

In H. D. 306, p. 179, the Army Engineers, after discussing the question as to whether there is any possibility of silting in flood-control reservoirs in the Ohio River basin, state:

> "337. * * * It is concluded, therefore, that *silting will not affect the usefulness of the flood-control reservoirs* proposed *in the Ohio Basin* to any appreciable extent during a 100-year period, representing the ordinary life of the structures.
>
> "338. * * * *no works to reduce the silt* contribution of the Ohio River to the Mississippi *will be worth while* and none is considered in this report."

The volume of dead storage at the Bluestone Project was therefore determined solely by the amount of power sought to be produced.

On the diagrammatic plate of the project attached to its reply brief in the District Court, the respondent accurately labeled this storage as "Dead Storage for Power Head" and made no pretense that it was intended or useful for any other purpose.*

With respect to the purpose and effect of the provision of storage for regulation of low-water flow, the contrast between the factual situation in the *Atkinson* case and in the instant case is equally sharp and complete. Any incidental increase in low-water flow resulting from the operation of the power project for power production at the Bluestone site is of no benefit to navigation. The Kanawha and Ohio Rivers are fully canalized streams. In an official report upon the *surplus* water available for water power during the next 50 years at the navigation dams on the Kanawha

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* Since the foregoing engineering reports were made, the Claytor Power Reservoir on New River near Radford, Virginia, has been completed. Thus, even if the question of silting had not been found by the Army Engineers to be of no consequence, that reservoir would obviously prevent any material silting downstream. (H. D. 306, p. 179, par. 337.)

River, the Corps of Engineers reserved only 250 cubic feet per second for *all* other uses, including navigation and domestic water supply. (Report of the Division Engineer, Upper Mississippi Valley Division, United States Army, February 24, 1932, par. 7.) The surplus over 250 c.f.s. has been leased by the Government for power development. In comparison, the natural extreme low-water flow on the Kanawha River is from 1000 to 1100 c.f.s. (H. D. 31, 73rd Cong., 1st Sess., p. 8, par. 2).

Any benefit to navigation from reduction of "flash floods", negligible as it is, accrues from the flood-control project included in the Bluestone Statutory Scheme and not from the power project. And, excepting any benefit which accrues to navigation from flood-control, the Army Engineers have reported that no benefit whatever will accrue to navigation from the execution of the Bluestone Statutory Scheme. (H. D. 306, p. 80, Table 19; p. 94, Table 27; p. 183, Table 53.)

While the Kanawha and Ohio Rivers are fully canalized streams, with abundant water supply at all times for every need of navigation, the situation in the *Atkinson* case was the precise antithesis. Navigation on the Red River is in open channel and the channel "is unstable due to its silty bed and difficult to maintain". (H. D. 541, p. 67, par. 73.) The low-water flow of the Red River is inadequate for purposes of navigation, and low-water regulation is required "to furnish a dependable navigation improvement". (*Ibid.*, p. 67, par. 72.) The engineering report in the *Atkinson* case repeatedly stressed that the proposed project would provide "a dependable low-water flow" which "would be of distinct benefit to the small commerce now developed upon those reaches of the lower Red River which are included in approved navigation projects". (*Ibid.*, pp. 79-80, par. 4; see also p. 67, par. 72.)

In the instant case the engineering reports establish, and it is not denied, that the provision of dead storage and power storage to create the water power at the Bluestone site *cut the annual flood benefits in half or from $740,000 to $370,000 annually* (pp. 2-3, *supra*). Manifestly, the power project in the Bluestone Statutory Scheme is not in aid of, but in direct conflict with and included at the expense of, flood-control. Plainly in the Bluestone Statutory Scheme there is no constitutional relation between the power project and the flood-control project.

The foregoing constitutional facts would in any event necessarily underlie and delimit the decision in the *Atkinson* case, but that they are the controlling factual bases of the decision is made inescapably clear both by the text of the opinion and by the copious footnote references to the engineering reports setting forth such facts (*Atkinson* opinion, L. Ed., l. c. 985, 986, 988, 989, 990, 991).

Without going into further detail, we summarize some of the controlling differences between the constitutional facts in the *Atkinson* case and in the case at bar:

The dead storage in the *Atkinson* case was necessary to provide space for silt accumulation in order to accomplish the designed flood-control and navigation benefits; and the amount of dead storage provided was measured and determined not by the needs of power development, but by the amount of space required for silt accumulation. (Definite project for Dennison Dam and Reservoir—Red River, pars. 24-25; H. D. 541, 75th Cong., 3rd Sess., p. 45, par. 50; p. 67, par. 73; *Atkinson* opinion, L. Ed. Report, l. c. 990.) *Here* (*i. e.*, in the instant case), there is no silting problem and dead storage is neither needed nor provided for silt accumulations but solely to create head for power (pp. 6-7, *supra;* H. D. 91, p. 34, par. 37; pp. 100-1, par. 14;

H. D. 306, p. 179, pars. 337-8). In the *Atkinson* case, dead storage was in aid of flood-control and navigation. *Here*, it is in aid of neither and is provided at the expense of flood-control.

In the *Atkinson* case, storage for regulation of low-water flow was necessary for the benefit of navigation (H. D. 541, p. 67, pars. 72, 73; pp. 79-80, par. 4; Opinion, L. Ed., l. c. 985, 986, 989). *Here*, storage for regulation of low-water flow is not needed or provided for navigation, but is needed and provided solely for the creation of water power (H. D. 306, p. 80, Table 19; p. 94, Table 27; p. 183, Table 53).

Whereas the provision of dead storage and storage for low-water regulation were both in aid of navigation and flood-control in the *Atkinson* case, *here* the dead storage and power storage are of no benefit to navigation or flood control, and instead reduce the flood benefits by one-half or from $740,000 to $370,000 annually (pp. 2-3, *supra*). Of course, the dead storage could in any event contribute nothing to low-water flow.

Whereas in the *Atkinson* case it was planned to draw down the storage for low-water regulation in advance of floods (Opinion, L. Ed., l. c. 990), *here* it is not planned so to do. On the contrary, except on prediction of a large flood, it is even proposed to encroach to some extent upon the flood storage for power purposes (H. D. 91, p. 115, pars. 62, 63).*

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* Even if such were not the plan of the official report and it were attempted to manipulate the power-storage so as to offset to a minor extent the great damage inflicted upon flood-control by the utilization of the major part of the Bluestone site for the power project, there would remain the barrier that flood-control and hydro-electric development in the Appalachian region are in fundamental and irreconcilable conflict. The same part of the same site cannot be used for both. In short, the power-storage at the Bluestone site cannot be available for replenishing the natural low water flow for the purpose of generating electric power in the summer

In the *Atkinson* case, the project would "fully control the maximum flood of record" (Opinion, L. Ed., l. c. 991; Definite Project for Dennison Dam and Reservoir, par. 14), and there was no indication that the project, basically one for flood-control, would have been projected but for flood-control (Opinion, L. Ed., l. c. 988). *Here* one-half the flood benefits have been sacrificed to the creation of the power project and the small flood-control project included in the scheme is obviously inadequate to control the maximum flood of record.

In the *Atkinson* case, the conflict between flood control and power development was "more apparent than real" (Opinion, L. Ed., l. c. 990). *Here* the conflict is complete and reduces flood benefits by one-half.*

When a statutory scheme includes two projects, of which only *one* is directed to the performance of a constitutional function, or when a structure purportedly authorized to

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and autumn months and at the same time be empty to receive and control floods like those of July, 1916, August, 1940, September, 1878, etc. Indeed, the records show that on New River floods may be expected at any time during any season of the year (H. D. 91, pp. 63-66).

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* In the court below, respondent, in support of a contention that power development and flood control are not conflicting at the Bluestone site, cited the excerpt from the report of the National Resources Committee which is quoted in footnote 56 of the *Atkinson* opinion. The report correctly states that "with respect to a particular reservoir" conflict would arise if it were attempted to use the same storage for both power development and flood control. When the report states that power and flood control may be reconciled by constructing separate reservoirs for each on the same stream or by providing separate storage space for each at the same site, that does not mean that the two uses are not in conflict, but merely that some of the available storage sites or storage space may be allotted to each—either because all of the available storage sites or space on a particular stream are not needed for flood control, or because Congress deems their use for non-federal purposes, such as power development or agriculture, more valuable and beneficial to the public.

serve a constitutional purpose is *enlarged,* not in order to forward the constitutional objective, but *to create water power which would not otherwise be created,* or when a part of a structure is to be devoted to the creation of water power *at the expense of the constitutional objective,* then the creation of that water power is *not* the *incidental* result of the performance of the constitutional function but instead is in excess of the constitutional authority of the Federal Government.

In the light of the foregoing, the lower court plainly erred in holding that the *Atkinson* case sustains the authority of the respondent to provide dead storage and power storage where, as in the instant case, such provisions are not in furtherance, but at the expense, of the accomplishment of any constitutional function and serve only to create water power for sale to the public. The decision of the lower court on this point is, we submit, plainly in conflict with the decisions of this Court in the *Atkinson* case and in the other cases cited at page 11, *supra;* but if not, then this is plainly an important question of federal law which has not been, but should be, decided by this Court.

Where, as was true in the *Atkinson* case, water power is created incidentally in the provision of facilities necessary for the accomplishment of a constitutional function, it is, of course, no constitutional objection that profits from sale of the water power may help to defray the cost of the project or otherwise enrich the Government. But, the converse is not true. The fact that the construction and operation of a power project might be profitable to the Government supplies no constitutional authority for undertaking the project.

Conclusion.

The other grounds relied upon for issuance of the writ are, we think, sufficiently clear upon the face of the petition so that further discussion in the supporting brief is unnecessary. For the reasons stated in the petition and in this supporting brief, the petition should be granted.

Respectfully Submitted,

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Dated: October 6, 1941.

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 685

WEST VIRGINIA POWER COMPANY, A CORPORATION, AND NORFOLK & WESTERN RAILWAY COMPANY, A CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court wrote two opinions which are reported at 33 F. Supp. 756 and 39 F. Supp. 540, and printed in the record at pages 27–44 and 52–64. The opinion of the Circuit Court of Appeals (R. 68–80) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals sought to be reviewed was entered September 17, 1941 (R. 81). The petition for a writ of cer-

tiorari was filed October 7, 1941. The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether, under the Executive Order of September 12, 1935, and the Flood Control Acts of June 22, 1936, and June 28, 1938, the execution of a definite agreement for the disposal of the electric power to be generated at the Bluestone Dam and Reservoir Project is a condition precedent to the condemnation of land for that project.

2. Whether the Bluestone Project, which involves the construction of a dam and reservoir on a navigable stretch of the New River in West Virginia for the purposes of flood control, protection and improvement of navigation, and generation of hydroelectric power, is constitutional.

STATUTES INVOLVED

The pertinent provisions of the Flood Control Acts of June 22, 1936, 49 Stat. 1570, 1572, 1586, and June 28, 1938, 52 Stat. 1215, 1217, are set forth in the Statement, pp. 6–7, 8, *infra*.

STATEMENT

The United States brought this proceeding to condemn lands for the Bluestone Dam and Reservoir Project which is to be constructed on the New River in West Virginia (R. 1–15). Petitioner West Virginia Power Company is the record

owner of the properties which the Government seeks to acquire, and petitioner Norfolk & Western Railway has a right-of-way through some of the tracts. The relevant facts are as follows:

1. *The Bluestone Dam and Reservoir.*—The New River rises in the Blue Ridge Mountains of northwestern North Carolina and flows north across Virginia and into West Virginia where it joins the Gauley River to form the Kanawha. The Kanawha continues northwesterly and empties into the Ohio River at Point Pleasant, West Virginia (H. Doc. 91, 74th Cong., 1st sess., pp. 1, 5, 10, 22, 23, 98). The site selected for the Bluestone Dam is three miles above Hinton, West Virginia (H. Doc. 91, p. 111). This Court recently held that the New River is navigable at that point. *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 419.

The dam will be approximately 165 feet high and 2,000 feet long. The reservoir will occupy the valley of the New River for a distance of 36 miles and will have a total storage capacity of 609,400 acre feet. Of this, 236,000 acre feet will be reserved exclusively for flood control and the remainder will be divided between power storage and dead storage. A substantial portion of the 245,400 acre feet assigned to power storage could be made available for additional flood control by drawing down the level of the power pool when reports predict a flood of magnitude requiring increased storage space. Also, the discharge from

the power pool will provide a regulated stream flow in times of low water (H. Doc. 91, pp. 3, 7, 94, 100, 109–110, 111, 113, 115, 117; R. 22). The 128,000 acre feet of dead storage will provide a head for the generation of power and space for silt accumulation.

The project is designed to reduce below bankful stage all floods which have occurred since 1896. The Army engineers estimate that the *annual* benefits from flood protection will total $370,000.00, distributed as follows: $250,000.00 for the Kanawha and New River basins and $120,000.00 for the Ohio River Valley (H. Doc. 91, pp. 4, 8, 94, 106, 117–118, 119–120). And it is expected that in a year of average stream flow the project will generate over 400,000,000 kilowatt-hours of electricity (H. Doc. 91, pp. 3, 7–8, 94, 115–116, 119–120). The Board of Engineers for Rivers and Harbors has found that the sale of this energy will render the $13,000,000.00 project "self-liquidating" (H. Doc. 91, p. 9; cf. pp. 95, 119–120).

2. *Authorization of the project and prior litigation.*—The Bluestone Project was recommended by the Army Engineers and authorized by Congress as a part of a nation-wide plan of flood control. It represents the culmination of extended consideration of floods on the New River and the Kanawha, in connection with the larger problem of flood control on the Ohio and Mississippi Rivers.

Pursuant to the directions contained in the Acts of January 21, 1927, sec. 1, 44 Stat. 1010, 1015, and May 15, 1928, sec. 10, 45 Stat. 534, 538, the Secretary of War, on January 29, 1935, transmitted to Congress a report prepared by the Chief of Engineers which dealt with the New River and the Kanawha. This report, which was later printed as House Document 91, 74th Cong., 1st sess., recommended (p. 5):

> * * * the construction by the Federal Government of the Bluestone Reservoir project for the purposes of power development, flood control, and navigation in accordance with the general plans set forth in this report with such modifications as may be approved by the Chief of Engineers, at an estimated cost of $13,000,000, provided that definite agreement is entered into before construction is begun for the disposal of the power at prices and under conditions that in the opinion of the Secretary of War will fully protect the public interest.

In August 1935 the Secretary of War submitted to Congress another report which contained a comprehensive plan for the control of floods on the Ohio River. The Bluestone Reservoir, which had previously been recommended in the report on the Kanawha, was also included as a part of that plan (H. Doc. 306, 74th Cong., 1st sess., pp. 4–5).

On September 12, 1935, the President, acting pursuant to Title II of the National Industrial

Recovery Act of June 16, 1933, 48 Stat. 195 (40 U. S. C., secs. 401–414), and the Emergency Relief Appropriation Act of April 8, 1935, 49 Stat. 115, issued Executive Order No. 7183–A which directed the Secretary of War "to proceed with the construction of [the] Bluestone Reservoir Project in accordance with the report of the Chief of Engineers to Congress and the plans and specifications submitted therewith * * *" (R. 72). By this same order the President allocated $800,000.00 for land acquisition and directed the Secretary of War "to proceed to acquire and clear * * * [the necessary] lands in anticipation of their use for such project" (R. 73).

Thereupon, proceedings were instituted to condemn the same lands as are involved in the present suit. The Power Company demurred on the ground that "the Acts relied upon as authority for the issuance of the Executive Order were * * * unconstitutional delegations of legislative power." (See pet. pp. 6–7.) Before the district court rendered a decision on this demurrer Congress passed the Flood Contral Act of June 22, 1936, 49 Stat. 1570, 1572, 1586, which provides—

> * * * the following works of improvement, for the benefit of navigation and the control of destructive flood waters and other purposes, are hereby adopted and authorized to be prosecuted * * * in accordance with the plans in the respec-

tive reports and records hereinafter designated:

* * * * *

Reservoir system for the reduction of Ohio River floods below Pittsburgh: Construction of reservoirs *including the completion of the Bluestone Reservoir now under way* * * *. [Italics supplied.]

In spite of this statute the district court sustained the demurrer (R. 34). The court of appeals reversed, holding that both the executive order and the 1936 Act furnished authority for the condemnation of the required land. *United States* v. *West Virginia Power Co.*, 91 F. (2d) 611, 613–614 (C. C. A. 4, 1937). Shortly thereafter, on October 26, 1937, the Secretary of War wrote to the Attorney General advising that funds to pay the awards were no longer available and requesting that the proceedings be dismissed. Before the dismissal could be effected the Power Company, on November 2, 1937, filed a petition for a writ of certiorari (R. 35). That petition was dismissed on motion of the Company's counsel when the Government indicated it would not prosecute the condemnation proceedings (302 U. S. 770–771).

After extended hearings [1] which disclosed the disposition of the first condemnation suit and re-

[1] Hearings before the Committee on Flood Control, House of Representatives, 75th Cong., June 7–11 and 15–18, 1937 (pp. 345, 417–419), and March 30 to April 19, 1938 (pp. 154, 438, 461–463). See also H. Rep. No. 2353, 75th Cong., 3d sess., May 13, 1938, p. 6.

vealed that work had been halted, Congress by the Flood Control Act of June 28, 1938, 52 Stat. 1215, 1217, again authorized the Bluestone project in the following language:

> * * * the provisions of Executive Order Numbered 7183A, dated September 12, 1935, are approved, and the acquisition at the cost of the United States of all lands, easements, and rights-of-way needed for the Bluestone Reservoir project are hereby authorized * * *

3. *The present suit.*—This suit was begun June 26, 1939 (R. 1). Petitioners filed separate identical demurrers (R. 45–47, 48) attacking the Government's amended petition for condemnation on the grounds that (1) the execution of an agreement for the disposal of the power is a condition precedent to the condemnation of land for the Bluestone project and (2) the purposes for which the land is sought to be acquired are in excess of the constitutional powers of the Federal Government. The district court, on authority of this Court's decisions in *Oklahoma* v. *Atkinson,* decided June 2, 1941 (No. 832, Oct. Term, 1940) and *United States* v. *Appalachian Power Co.,* 311 U. S. 377, overruled the second ground of the demurrers (R. 62). However, the court sustained the demurrers on the first ground (R. 62–64) and on July 1, 1941, entered an order dismissing the petition for condemnation (R. 49–52).

The Government appealed (R. 64–65) and, because of the importance of the Bluestone project from the viewpoint of national defense, asked that the case be set for argument at a special term (R. 66). This request was granted and on September 17, 1941, the circuit court of appeals reversed (R. 81). The opinion expressed the view (R. 80) "that the construction of this project * * * should not be further delayed, except to the extent necessary to afford the parties a full and fair hearing." Accordingly, it was provided that the mandate should issue in twenty days unless in the meantime petition for a writ of certiorari was filed (R. 80, 81). The petition was filed on the twentieth day and the mandate has been stayed (R. 81) pending action by this Court.

ARGUMENT

1. The court of appeals, noting that petitioners were insisting upon a point which had not even been raised in the prior litigation (R. 71), held that the Government may condemn land for the Bluestone project without first entering into an agreement for the disposal of the electric power which will be generated (R. 70–75). Contrary to petitioners' assertion (Pet. 9–10), this decision does not present a question of importance. The executive order and statutory authorizations here involved are not of general applicability but relate

solely to the Bluestone project. Consequently, no other project will be affected in any way.

Moreover, the decision that neither the President nor Congress adopted the condition as to disposal of power contained in the recommendation of the Chief of Engineers is plainly correct.[2] The Executive Order of September 12, 1935 (No. 7183–A), the Flood Control Act of June 22, 1936, 49 Stat. 1570, 1572, 1586, and the Flood Control Act of June 28, 1938, 52 Stat. 1215, 1217, expressly and unconditionally authorized the Bluestone project and directed the Secretary of War to proceed with the acquisition of the necessary lands. (See pp. 6–8, *supra*.)

2. On the authority of this Court's decision in *Oklahoma* v. *Atkinson* (No. 832, Oct. Term, 1940, decided June 2, 1941), which upheld the right of the United States to build the Denison dam on the Red River, both the district court (R. 62) and the court of appeals (R. 77–79) held that the Bluestone project is constitutional. The two projects, as the statement in this case (pp. 3–4, *supra*) and the opinion in the *Atkinson* case disclose, are similar in every material respect. Accordingly, there is no merit in petitioners' argument (pet. 24–33) that the Federal Government is acting in excess of its constitutional authority.

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[2] There is no basis for the suggestion (pet. 10, 19, 20–21) that the decision below is in conflict with *United States* v. *Arizona*, 295 U. S. 174, 189, or *Ryan* v. *Chicago, B. & Q. R. Co.*, 59 F. (2d) 137, 143 (C. C. A. 7).

CONCLUSION

The decision of the court of appeals is correct and presents neither a conflict of decisions nor a question of general importance. Therefore, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 685.

WEST VIRGINIA POWER COMPANY, a corporation, and NORFOLK & WESTERN RAILWAY COMPANY, a corporation,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF FOR PETITIONERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

RAYMOND T. JACKSON,
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IN THE

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OCTOBER TERM 1941.

No. 685.

WEST VIRGINIA POWER COMPANY, a Corporation, and
NORFOLK & WESTERN RAILWAY COMPANY, a Corporation,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

REPLY BRIEF FOR PETITIONERS.

This brief is confined to a summary reply to certain statements and contentions of the respondent.

1. Respondent asserts that some indeterminable portion of the power storage in the Bluestone Statutory Scheme "*could* be made available for additional flood control by drawing down the level of the power pool when reports predict a flood of magnitude requiring increased storage space" (Resp. Br., p. 3).* Even this artfully worded statement, wholly unsupported and unsupportable by any citation to H. D. 91 or any other report, does not pretend that under the Bluestone Statutory Scheme this *is*

* Unless otherwise indicated, all italics herein are supplied.

intended to be or *would* be done. In fact the reports of the Engineers show not only that (except during a period of low water when there may have been draw-down for power purposes) the power storage is to be kept *full* (elevation 1490), but that it is even contemplated to encroach upon the flood control reservoir by impounding water for power purposes up to elevation 1500. The report says that "*if above 1490* when reports predicted a flood of magnitude", sufficient water will be released merely to draw the water "*down* to elevation 1490" (the top of the power reservoir), which will make "available for flood storage the full portion of the reservoir allotted to flood control" but none of the power storage (H. D. 91, p. 115, par. 62-3). Respondent's assertion amounts merely to a claim that it might be theoretically possible (although actually not contemplated) to manipulate the power reservoir so as to offset to a very limited and undependable extent a small part of the damage inflicted upon flood control by utilization of the major part of the site for the power project. This is a far cry from showing that the power project is incidental to, or in aid of, the flood control project or of flood control. See Petition and Supporting Brief, 11-12, 31-32.*

2. Respondent asserts that the "dead storage will provide a head for the generation of power *and* space for silt accumulation" (Resp. Br., p. 4). The latter half of this assertion too is wholly unsupported and unsupportable by citation to H. D. 91 or any other report; and respondent wholly ignores the fact that both H. D. 91 and H. D. 306 inescapably establish that there is no silting problem and that dead storage at this project is neither needed, nor useful, nor intended for silt accumulation, but solely for power development—as is patent from the showing in Pet. 26-27.

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* Hereinafter, references to either the Petition or the Supporting Brief are designated merely as "Pet.....".

3. Respondent cryptically asserts that the incidental increase of the low water flow resulting from the operation of the power project "will provide a regulated stream flow in times of low water" (Resp. Br. 3-4). Respondent wholly fails to face the undisputed facts that, as shown at Pet. 27-28, such increase in low water flow as may incidentally result from the operation of the power project will be of *no benefit to navigation* and hence will not promote any constitutional function.

4. Respondent asserts that the "project is designed to reduce below bankful stage all floods which have occurred since 1896" (Resp. Br. 4). However, the Engineering Reports state that the Bluestone Reservoir, even if it were devoted solely to flood control, "cannot be depended upon to control the Kanawha River's discharge within its banks", for the reason, among others, that "the proposed reservoir has not sufficient capacity to retain maximum run-offs that *have occurred*"; also that "in 1897 and 1899 the Bluestone Reservoir would not have brought the flood within the banks of the Kanawha River" (H. D. 91, p. 118, pars. 70, 71; p. 106, par. 32). Respondent points to the annual benefits of $370,000 estimated to result from the flood-control project and to the expected returns from the power project of the Statutory Scheme (Resp. Br. 4), but leaves unstated that such flood-benefits are only one-half of the $740,000 which, according to the same Army Engineers, would result had not the major part of Bluestone Reservoir been diverted to the power project, with corresponding sacrifice of flood-control benefit (H. D. 91, p. 94, par. 4(a); Pet. 2-3).

5. Respondent fails to meet the issue as to the authority of Congress to authorize power projects and instead urges the importance of the flood problem and of flood

control (Resp. Br. 4-5). But there is no issue here either as to the importance of the flood-control problem or as to the authority of Congress to construct flood-control structures. Undoubtedly the Congress may refrain from utilizing for flood control all or a part of a site in order that the site or part thereof may be utilized for power production or, for that matter for farming, but the fact that utilization of part of the site for power production is *at the expense of flood-control benefits* establishes inescapably that such use is not the incidental result of or in aid of flood-control at the site.

6. Respondent implies that Congress by the Act of 1936 authorized the project "in accordance with the plans" in some report designated in that Act (Resp. Br. 6-7). This is plainly untrue as the only report mentioned by that Act in connection with this or any other part of the Ohio River Basin is H. D. 306, and no plans for the Bluestone project accompanied that report (Pet. 5). Moreover, the earlier condemnation proceeding (in which the court below in August, 1937, held that Executive Order No. 7183A had been ratified by the Act of 1936 so as to cure any illegal delegation of legislative power) was dismissed three months later on the Government's own motion while the landowner's petition for certiorari was pending in this Court. The present proceeding was not brought until the Executive Order had been approved by the Act of 1938. The only material question here is the effect of the Act of 1938, as shown in the instant petition and supporting brief (Pet. 9, 22).

7. Contrary to the statement of respondent (Resp. Br. 7), the court below in the earlier proceeding expressly refrained from deciding whether the Executive Order furnished any authority, independent of the 1936 Act, for condemning the lands, viz. whether the Acts of Congress

upon which the Executive Order expressly relied (Recovery Act and Relief Appropriation Act) were invalid, as unconstitutional delegations of legislative power. The court said "it is not necessary to decide this point here" (91 F. (2d) 611, 614).

8. Respondent asserts that, whether or not a Congressional authorization for federal officers to carry out a project "in accordance with the report of the Chief of Engineers *and* the plans and specifications submitted therewith" requires the federal officers to observe a condition imposed by such report, is not "a question of importance" (Resp. Br. 9). This contention is founded upon the claim that the pertinent Executive Order, and the statute adopting the provisions of that Order, have bearing only upon a single project. Viewed so narrowly, almost no decision of a circuit court of appeals, even though it be determinative of the most widely applicable principle of law, would be subject to review by this Court. Moreover, it is a matter of common knowledge (apparent from any examination of Rivers and Harbors Acts and similar Acts) that Congress frequently, if not invariably, authorizes projects individually and specifically. Indeed, specific designation by Congress is necessary to avoid unconstitutional delegation of legislative power. But it by no means follows that it is not a matter of general importance whether a Congressional authorization to construct a project in accordance with a report of the Chief of Engineers requires the officers to observe conditions specified in that report even though the particular authorization relates only to a single project. Plainly it is an important question of federal law whether under such an authorization the federal officers must comply with all or none or only some of the conditions imposed in that report in

accordance, and only in accordance, with which such officers are authorized to proceed (Pet. 9-10).

9. Respondent asserts, without supporting argument or reason, that the decision below is not in conflict with *Ryan* v. *C. B. & Q. R. R. Co.,* 59 F. (2d) 137, 143 or *United States* v. *Arizona,* 295 U. S. 174. The *Ryan* case laid down the principle that, where federal officers are authorized to condemn lands for a project *in accordance with plans and specifications* in a designated report, they are without authority to condemn lands for a project not in accordance with such plans and specifications. Plainly, any holding that, where federal officers are authorized to condemn lands for a project "*in accordance with a report* of the Chief of Engineers", such officers may disregard conditions imposed by that report, is in conflict with the principle applied in the *Ryan* case. That the decision of the court below is in conflict with the principle applied by this Court in the *Arizona* case is, we think, sufficiently shown in our supporting brief (Pet. 20-1).

10. Respondent baldly makes the categorical assertion that the facts in the instant case and in *Oklahoma* v. *Atkinson Co.,* 85 L. Ed. 977, "are similar in every material respect" (Resp. Br. 10). Yet respondent does not deny, and it can not deny, the undisputable facts reviewed in our supporting brief (Pet. 25-31) which show that the constitutional facts in the *Atkinson* case are precisely the opposite of those in the case at bar. Instead of supporting the lower court, the *Atkinson* case, as well as many other decisions of this Court cited in our supporting brief, plainly demonstrate the error of the decision of the lower court. In the *Atkinson* case, the creation of dead storage and of storage for low water regulation were plainly and clearly necessary for the provision of flood control and the improvement of

navigation, quite apart from the fact that they incidentally and necessarily created water power. In the instant case, however, there is a complete absence of any constitutional relation between the creation of the dead storage and the power storage for power development and any constitutional function of the United States.

Without going into further detail, we earnestly invite the attention of the Court to the fact that respondent, seeking to avoid the effect of the undisputed facts by resort to incomplete statements, erroneous and unsupported statements and bald disregard of material facts, has not attempted to dispose of various of petitioners' reasons and arguments for granting the petition nor to meet the important questions of law raised under the undisputed facts of this case.

Respectfully submitted,

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